

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

MILWAUKEE DISTRICT COUNCIL 48,
AFSCME, AFL-CIO

and

MILWAUKEE METROPOLITAN SEWERAGE
DISTRICT

Case 243
No. 45656
MA-6693

Appearances:

Podell, Ugent & Cross, S.C., Attorneys at Law, by Mr. Alvin R. Ugent, appearing on behalf of the Union.

Mr. Harold B. Jackson, Jr., Senior Staff Attorney, Milwaukee Metropolitan Sewerage District, appearing on behalf of the Employer.

ARBITRATION AWARD

On April 26, 1991, Milwaukee District Council 48, AFSCME, AFL-CIO, hereinafter the Union, with the concurrence of the Milwaukee Metropolitan Sewerage District, hereinafter District or Employer, requested the Wisconsin Employment Relations Commission to appoint a member of its staff to act as the impartial arbitrator involving a dispute concerning whether the District was required to underfill the Traffic Clerk position. Hearing in the matter was held on September 17, 1991, at which time the parties were afforded the opportunity to adduce testimony and introduce documentary evidence. A stenographic transcript of the proceedings was taken, and the parties concluded filing post-hearing briefs by December 16, 1992.

ISSUES:

1. Was the subject grievance timely filed and therefore arbitrable?
2. Did the District violate the April 13, 1987, agreement between the parties pertaining to the position of Traffic Clerk as set forth in the Nagorski letter of April 21, 1987 (Joint Exhibit No. 1) when it failed to include the under-filling language in the December, 1987, Notice of Job Opening for Traffic Clerk in the Marketing Division?

PERTINENT CONTRACT LANGUAGE:

PART III

A. GRIEVANCE AND ARBITRATION PROCEDURE.

. . .

4. Procedure.

Step 1. If an employee has a grievance, he/she shall first present the grievance orally to his/her immediate supervisor, either alone or accompanied by a Union representative. Such grievance shall be presented within thirty (30) calendar days of the event giving rise to the grievance or within thirty (30) calendar days of the time the grievant could reasonably be expected to have knowledge of the event.

If the grievance is not disposed of orally within three (3) working days of the initial presentation, the grievance shall be reduced to writing and referred to Step 2.

. . .

April 21, 1987

Mr. Earl Gregory
Staff Representative
District Council 48, Local 366
3427 West St. Paul Avenue
Milwaukee, WI 53208

Dear Earl:

The purpose of this letter is to summarize our discussion and agreement on April 13, 1987 regarding the position of Traffic Clerk at MMSD. The Traffic Clerk position has been approved for recruitment on the following basis:

1. A revised job description has been developed, incorporating the duties to be performed by this position within the newly created Marketing Department (copy attached).
2. The Traffic Clerk and/or Shipping Clerk position may not be required in approximately 2-3 years, but will be evaluated by management on an annual basis, or as each of these milestones occur:

- a. automation of the Marketing and Solids Manufacturing Departments is completed;
 - b. the packaging operation is moved back on site and the clerical functions are centralized at one location;
 - c. further development of the marketing function is completed, i.e. traffic operations may be linked with shipping on the production/distribution side rather than marketing.
3. The position will be bid according to the existing bid ladders identified in the contract, with one minor editorial change, i.e. "Solids Utilization" will be replaced by "Marketing", as there no longer exists a Solids Utilization Department.
 4. If no current employees meet the minimum qualifications for the position, the District has agreed to underfill the position with the understanding that the person selected would have to complete the required coursework within 18 months of appointment, barring unforeseen circumstances such as long term personal illness or courses not being offered. If the employee does not pursue the required courses, or does not satisfactorily complete them, he/she will be demoted or bumped back to his/her former classification.
 5. The wage schedule, based on our current contract, for an underfill appointment would be:

\$945.00	\$963.62	\$993.56
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An employee would be paid \$945.00 biweekly, upon appointment, and would continue at that rate of pay until his/her one year anniversary, or until the required courses were successfully completed, whichever occurred first, whereupon he/she would move to the second increment of \$963.62. Movement to the third increment (\$993.56) would occur at his/her two year anniversary, or upon successful completion of all required courses, whichever occurred later.

For your information, our Training Manager, Ann Heidkamp, found out that MATC offers an associate degree program in Transportation and Distribution and courses in that area are also available to non-degree candidates. The courses will

tentatively be offered as follows:

Fall '87

Economics of Transportation	3 credits
Physical Distribution Management**	3 credits

Spring '88

Traffic Management*	3 credits
Transportation Regulation**	2 credits

Fall '88

Commercial Transportation	2 credits
Freight Loss & Damage Claims**	2 credits

Spring '89

International Markets**	2 credits
Rates & Tariffs**	3 credits

We will provide this information to anyone who is interested in bidding on this position.

If you have any questions or comments, please feel free to contact me.

Sincerely,

Valerie L. Nagorski /s/

Valerie L. Nagorski
Labor Relations Analyst

VLN/tdl

Attachment

cc: William K. Strycker
Stephen J. Inman
Glinda Loving

Frank Munsey
Barbara Davis
Tom Kaczowski
Clara Addison
Dick Rupp

*particularly pertinent course

**prerequisite required

BACKGROUND:

At the time that the parties negotiated the April 13, 1987, agreement respecting the filling of the Traffic Clerk position, which is the subject of this grievance, the District was operating under a long range human resources plan which contemplated new facilities being created as a consequence of the Water Pollution Abatement Program; and that these new facilities would mean that there would be an excess of staff. Thus, the District had committed to its employees to provide resources to develop themselves, retrain themselves, and had further committed to both employees and the Union that they would attempt to place employees whose jobs were going to be abolished in other positions within the District.

Thus, the District met with the Union to discuss the filling of the Traffic Clerk vacancy within the newly created Marketing Department. The result of those discussions was an agreement reached between the parties on April 13, 1987, which provided that the position would

be bid according to the existing bid ladders identified in the contract, with one minor editorial change, i.e. 'solids utilization' will be replaced by 'marketing,' as there no longer exists a Solids Utilization Department

and further, that

if no current employees meet the minimum qualifications for the position, the District has agreed to underfill the position with the understanding that the person selected would have to complete the required course work within eighteen months of appointment, . . .

Thereafter, the notice of job opening for Traffic Clerk Marketing Division was posted from April 27, 1987 through May 12, 1987. As it turned out, there were no qualified bidders, and thus pursuant to the April 13th agreement, the District underfilled the position. Solberg was the first individual to underfill the position, but he returned to his previous job after only serving three or four days as the Traffic Clerk. The District then underfilled the job with employee Shelly Biro, who successfully completed the probation and served in the position for several months until

bidding into another position. The position then remained vacant from November, 1987, until sometime in March, 1988, when the District hired Tom Lemoine from outside the District. Mr. Lemoine was hired pursuant to a posting that went up on December 1, 1987 and came down on December 15, 1987. This posting was similar to the previous posting of April 19, 1987, except it did not contain the proviso that in the event there were no District employees who met the minimum requirements that the District would underfill the position.

Subsequent to the December 1, 1987, posting Robert Vandehei, the Local 366 Union President, wrote to William Strycker, the District's Labor Relations Manager:

It was brought to my attention that the District intends to fill the Traffic Clerk Position from an outside source. As you are aware, this is in direct contrast to the agreement reached with Local 366 relative to that position.

Equally alarming were the statements made by Mr. Inman that the District was not satisfied with the agreement, therefore it felt justified in terminating it.

To avoid any speculation or misunderstanding on my part, I am requesting that you formalize your position on this matter in writing and forward it to me in timely manner.

Thereafter on January 19, Mr. Strycker responded to Mr. Vandehei:

The District recently posted a job vacancy for the traffic clerk position. The posting did not reference any opportunity to under-fill the position. After reviewing our previous efforts to underfill in this area, it became apparent that it was not successful. As you are aware, the District negotiated a special agreement with the Union to provide an underfill opportunity in filling the last vacancy. Nothing in that agreement indicated that the District would continue to use underfilling as a method of filling future vacancies. Had the District desired to underfill this most recent traffic clerk vacancy, we would have contacted the union and negotiated over that matter.

If you have any questions regarding this matter, please contact me.

Thereafter, on January 27, 1988, Vandehei filed the subject grievance.

POSITIONS OF THE PARTIES:

The District contends in the first instance that the grievance was not timely filed, and therefore cannot be considered by the Arbitrator. It points to the grievance procedure Step 1

which requires that "Such grievance shall be presented within thirty (30) calendar days of the event giving rise to the grievance or within thirty (30) calendar days of the time the grievant could reasonably be expected to have knowledge of the event," and notes that the grievance was opened on December 1, 1987, and closed on December 15, 1987. It asserts the grievance, however, was not filed until January 27, 1988, well in excess of the contractually required thirty day time limit for filing grievances.

With respect to the merits of the grievance, the District contends that the language of the April 21, 1987, Nagorski letter purporting to summarize the parties' agreement of April 13, 1987, is silent with respect to whether the underfill provisions of that agreement were of a temporary or permanent nature. However, the District believes that the underfill provision was a temporary accommodation. It believes this to be the only conclusion that can be reached because there was no language contained in the agreement stating that the position was to be a permanent underfill. Furthermore, the testimony of Inman and Union Representative Gregory were that the motivation behind the agreement was a conscious effort on both parties' part to fill vacant positions with people in the bargaining unit who were losing their jobs through consolidation. Also, there was no letter of understanding or negotiating note that the underfill provision for the Traffic Clerk was to be a permanent situation. Finally, the testimony was that the Sewerage District negotiator was directed to implement a plan that underfilled the Traffic Clerk position for the then current vacancy. For these reasons, the District urges the Arbitrator to find no violation and deny the grievance.

The Union, with respect to the issue of timeliness, points to the fact that the Employer never answered the grievance at the last step of the grievance procedure and argues that the District is not in a position to complain about the timeliness of the grievance. Furthermore, the testimony establishes that the grievance was filed within thirty days after the date the Union became aware, as a consequence of the communication between Vandehei and Strycker, that the District did not believe the April 13, 1987, agreement was binding for any other postings. Consequently, it concludes the grievance was timely filed, and requests the Arbitrator to so rule.

With respect to the merits of the grievance, the Union contends that the contract requires that for any new job classification the parties are to negotiate wage rates. In this case, there was a new job of Traffic Clerk, and the parties met to negotiate new rates and agreed upon new rates. It argues those rates were not temporary, but rather were expected to continue until and unless another agreement was entered into. That agreement with respect to wages was part of a total agreement and therefore the Union does not believe the District can argue that the April 13 agreement was temporary with respect to the underfilling provisions, but was permanent with respect to wage rates. It concludes that once the agreement was entered into it was permanent in all respects until a change was mutually agreed to by the parties. Further, if the agreement was intended to be a one time only agreement, it would have so stated. However, the April 27 Nagorski letter confirming the agreement contained no such statement. Rather, the Union believes

the District wanted out of the agreement because the underfilling with Biro had not worked out as well as the County had hoped. However, the Union insists that the only way out of the agreement for the Employer was to negotiate a new agreement, which was not done in this case. Thus, the Union concludes that the undersigned should find that the April 13 agreement relative to the filling of the Traffic Clerk position was violated, and sustain the grievance.

DISCUSSION:

The threshold issue presented by this case is whether the Union filed the grievance in a timely manner. Obviously, if the grievance was not timely filed, the Arbitrator is procedurally barred from consideration of the merits of the case.

Historically, parties have negotiated contracts specifying time limits for the filing of grievances. These agreements arise out of the belief that time limits provide an impediment to one party stalling and preclude presentation of old claims where investigation is made more difficult because the parties' memories have dimmed and/or records no longer exist. On the other hand, such time limits do operate to preclude resolution of grievances which in all probability should be settled for the sake of improving the labor relations climate, but cannot because of rigid enforcement of time lines. Thus, over the years, arbitrators have balanced these competing interests in the resolution of timeliness disputes. As a practical matter, the facts of each case become determinative as to whether the time limits of a particular grievance procedure will act to bar consideration of the merits of the grievance by the arbitrator.

In this case the District contends that the grievance, in order to be timely, had to have been filed within thirty days of the close of the December 1, 1987 posting. That posting closed on December 15. Thus, in order for the grievance to be timely under the Employer's theory of the case, it would had to have been filed by January 14, 1988. However, the grievance was not filed until January 27, 1988, thirteen days beyond the thirty day period as measured from the close of the posting.

As noted above, one of the principal, if not the principal reason for establishing time limits for filing grievances is to preclude the filing of stale claims. In this case, the Union president, by virtue of his January 4 inquiry of Labor Relations Director Strycker concerning the absence of the underfilling language on the December 1, 1987 posting, put the District on notice that there was a potential grievance over that issue. A little more than two weeks later, Strycker responded that it was not a misunderstanding, but in fact was the position of the District that they did not believe they were obliged to underfill the December 1 posting if there were no qualified bidders; and within eight days of Strycker's letter the Union grieved. Clearly, it cannot be said in this case that the Union was filing a grievance over a "stale" claim. Also, it wasn't until Strycker's January 19 response to Vandehei's inquiry that the Union knew for certain that the underfill language had not appeared on the posting as a result of a mistake. Thus, it could not be certain that the grievance

was proper prior to that time.

Just as there are time limits for the filing of grievances to preclude stale claims, there is also a desire on most parties' part, both union and management, that frivolous and unnecessary grievances not be filed. One way to attempt to insure that grievances that are filed are not frivolous is for the parties to be certain as to the other's position before grieving. That is why in many contracts the first step of the grievance procedure provides that the aggrieved discuss the potential grievance with the immediate supervisor before reducing the grievance to writing. Indeed, in this case, the contract states that "If the grievance is not disposed of orally within three (3) working days of initial presentation, the grievance shall be reduced to writing and referred to Step 2." Because the April 13, 1987, agreement was not of the nature that most employees would be expected to be knowledgeable, it was logical that its enforcement would necessarily fall to a Union official who was aware of its existence. Thus, Vandehei's correspondence to the District's Labor Relations Manager on January 4, 1988, although not oral, in this case can reasonably and logically be equated to an oral presentation referenced in Step 2, occurring within 30 days of the conclusion of the posting. Further, Vandehei's letter served to insure that the District did, in fact, not make a mistake in omitting the underfill language on the posting and put the Union on notice that it did not believe that it was obliged to do so as a consequence of the April 13, 1987 agreement. If this is the measuring point for determining timeliness, inasmuch as it was then the Union knew for certain that there was a disagreement, then the grievance was timely filed.

Consequently, the undersigned believes that the thirty day time limit for filing grievances whether measured from receipt by the Union of Strycker's January 19, 1988 letter to Vandehei, although it is not clear when the Union received Strycker's memo, or whether measured from the close of the posting on December 15, 1977, was complied with by the Union. Therefore, the undersigned finds that the grievance was timely filed under the contract and that consideration of the merits is not time barred.

The essence of the dispute between the parties on the merits concerns whether the April 13, 1987, agreement providing that the District would underfill the Marketing Department Traffic Clerk position, was an agreement to always underfill vacancies in said position, or whether that agreement merely obligated the District to underfill the then existing vacancy. The Union insists, for reasons noted earlier, that the agreement was a permanent agreement and that any time the Marketing Department Traffic Clerk position became vacant the District was obliged to underfill the position. To the contrary, the District contends that the agreement merely obligated it to underfill the vacancy in the spring of 1987, but not in perpetuity.

The April 21, 1987, Nagorski letter summarizing the settlement agreement does not explicitly deal with whether this agreement has application to all Marketing Department Traffic Clerk vacancies or just the vacancy which existed in the spring of 1987. Because the agreement is

silent, the undersigned must turn to the bargaining history for clues as to the intentions of the parties when they entered into that agreement.

At the time the agreement was entered into the District was in the midst of a reorganization resulting in the consolidation of operations and the elimination of positions. Both the District and the Union agree that the purpose of the underfill was to afford employees whose jobs were being eliminated, and otherwise did not meet the requirements for bidding on the Traffic Clerk position, an opportunity to bid in order to absorb them within the District and not resort to layoff. However, there is no record evidence that this consolidation and consequent position reduction was to continue indefinitely. Furthermore, there is no record evidence to suggest that in December of 1987, when the position was re-posted after Biro bid out, that there were employees whose positions had been eliminated and who were facing layoff. Thus, the record is devoid of any evidence to suggest that the conditions existing in the Spring of 1987, continued to exist in December of that year.

It clearly was a logical outgrowth of the Union and Employer's concerns for the employees whose positions were being eliminated to agree with respect to any vacancies that every effort would be made to fill the vacancies with employees whose jobs had been eliminated before going to the street to hire new employees. Thus, when the Marketing Department Traffic Clerk position became vacant, the parties negotiated the understanding that if there were not qualified bidders the Employer would underfill the position. In other words, the Employer would select an employee who was facing elimination and who did not meet the requirements of the posted vacancy. However, the Union is not arguing that the agreement to underfill continued only for so long as the situation which gave rise to the agreement existed, but that the agreement was permanent until one party or the other sought to negotiate a different arrangement. Were the Union taking the former position, it would more logically flow from the background and negotiating history surrounding the April 13 agreement. However, to argue, as they are now, that the parties intended this agreement to continue permanently without regard to whether the condition continues to exist that was the motivating factor underlying the agreement, i.e. employees were facing layoff due to job elimination, is not persuasive.

In trying to discern the intent of the parties one must look to the facts in existence at the time of the agreement. The facts in existence on April 13, 1987, were that people were facing layoffs due to elimination of their positions and every effort was being made by the Union and the Employer to avoid that situation if possible by filling existing vacancies with less than qualified existing employees before going to the outside labor market. It doesn't seem reasonable to conclude therefrom that either party intended that an agreement be reached which did more than deal with the immediate situation. If that had been the intent of the parties, because it would not be obvious to others, they needed to provide explicit language so stating. Thus, absent such language, the undersigned does not believe it is reasonable or logical to conclude that their intent at the time they entered into the agreement was to provide that all future Marketing Department

Traffic Clerk vacancies could be underfilled if there were no qualified bidders.

Based on the foregoing and the record as a whole, the undersigned enters the following

AWARD

1. The subject grievance was timely filed, and therefore arbitrable.
2. The District did not violate the April 13, 1987, agreement between the parties pertaining to the position of Traffic Clerk as set forth in the Nagorski letter of April 21, 1987, when it failed to include the underfilling language in the December 1987 notice of job opening for Traffic Clerk in the Marketing Department. Therefore, the grievance is denied.

Dated at Madison, Wisconsin this 15th day of March, 1993.

By Thomas L. Yaeger /s/
Thomas L. Yaeger, Arbitrator